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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

HARCOURT BRACE JOVANOVICH LEGAL AND PROFESSIONAL PUBLICATIONS, INC. AND COLORADO PROFESSIONAL EDUCATION, INC. D/B/A COLORADO BAR REFRESHER, INC.,

Petitioners,

vs.

MULTISTATE LEGAL STUDIES, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITION FOR WRIT OF CERTIORARI

STEPHEN M. AXINN
Counsel of Record
SKADDEN, ARPS, SLATE, MEAGHER & FLOM
919 Third Avenue
New York, New York 10022
(212) 735-3000

WILLIAM F. SCHOEBERLEIN
EDWARD P. TIMMINS
Of Counsel
OTTEN, JOHNSON, ROBINSON, NEFF & RAGONETTI
950 17th Street, Suite 1600
Denver, Colorado 80202
(303) 825-8400

Counsel for Petitioner CBR

HARDIN HOLMES
TUCKER K. TRAUTMAN
Of Counsel
IRELAND, STAPLETON, PRYOR & PASCOE
1675 Broadway, Suite 2600
Denver, Colorado 80202
(303) 623-2700

Counsel for Petitioner HBJ Legal

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INTRODUCTION

PMBR's opposition to the petition for writ of certiorari seeks to distract the Court by fabricating irrelevant factual disputes[1] but only serves to highlight the flaws in the Tenth Circuit's decision. The Tenth Circuit's decision treats composite products as tying arrangements subject to the per se rule of illegality, even though it is stipulated that consumers demand that the composite product include a component, also available separately. It creates a split among the circuits as to the availability of a business justification defense under the "per se" tying rule. In concluding that BAR/BRI's MBE training was sold below cost, it ignores the facts and the law and opens many valid business practices to antitrust challenge. Lastly, it creates an unprecedented and factually unsupported duty to cooperate with competitors. Each of these dispositive legal issues is fully presented on the record below and will not be further clarified by additional proceedings.

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[1] Knowing that the Court does not have the benefit of the record below, PMBR repeatedly engages in distortion and misstatement. Two examples will suffice. On page 5 of its brief, PMBR states, first, that it was "informed that such scheduling conflicts would persist until it agreed not to enter into the Colorado full service market" and, second, that there was a "900 percent increase in conflicts from 1990 to 1992." Neither statement is even remotely supported by PMBR's citations, which are attached hereto in the appendix ("App.") at 1a-19a.

PMBR also makes several inflammatory but irrelevant and incorrect factual statements. For example, PMBR reaches the remarkable conclusion that BAR/BRI had 76 percent of the supplemental market in 1993 by including enrollees in BAR/BRI's full-service course in the supplemental calculations. (Opp. at 5) PMBR ignores that it held a virtual monopoly in the stipulated supplemental MBE market in 1991. (Baseman Aff. Ex. 3)

I. THE TENTH CIRCUIT MISCONSTRUED THE TWO PRODUCT TEST

PMBR claims that tying occurs if separate demand exists for a component of a product, even if there is no demand for the composite product without inclusion of the component. The cases of *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984), and *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992), do not address this issue; instead, they simply rule out an extreme view of the two products inquiry -- that two products can be treated as one for antitrust purposes whenever they are functionally related.

Unlike the facts in *Kodak* and *Jefferson Parish*, PMBR stipulated that full-service bar review courses necessarily comprise a combination of training for all aspects of the Colorado bar examination. Thus, PMBR effectively concedes that consumers *demand* preparation for the MBE as part of a full-service bar review course. Indeed, PMBR admits that one-half to two-thirds of all Colorado full-service customers take no other MBE preparatory course. (Opp. at 9, point 4) It is also undisputed that all other full-service bar review providers include full MBE preparation in their full-service curricula at no additional cost. Finally, it is undisputed that, in 1992, BAR/BRI added an extra day of MBE training in response to competitors' advertising claiming that its MBE preparation was inadequate.[2]

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[2] (Davis Aff. ¶¶ 25-30) PMBR claimed that, by charging students extra for Gilbert, BAR/BRI was admitting that its full-service course contained inadequate MBE preparation. (Conviser Aff. ¶¶ 32, 37 & Exs. 8, 14) SMH and Barpassers attacked BAR/BRI for charging students "extra" for what it claimed was included in SMH's course for "free." (Conviser Aff. ¶¶ 33, 35 & Exs. 3, 9-11)

PMBR's stipulation, therefore, satisfies the requirement in *Jefferson Parish*, 466 U.S. at 19, and *Kodak*, 504 U.S. at 462, that the existence of two products turns on the character of *demand* for them, rather than on their functional relationship. PMBR correctly observes that *Jefferson Parish* treated as tie-ins the sale of two functionally linked products, one of which was useless without the other. (Opp. at 10-11) However, the case at bar deals with a different issue; here there is no demand for the tying product without inclusion of the allegedly tied product. Thus, although functionally related, guns and bullets are separate products, while guns and gun stocks are not. Similarly, cookies with butter are a single product; adding extra butter does not change the result.[3] As stipulated by PMBR, MBE training is part of the single product known as a full-service bar review course.

All the evidence cited by PMBR, such as the eight factors cited on pages 9 and 10 of its brief, is irrelevant to the issue presented to the Court for review because it merely shows that there is a market for supplemental workshops, a fact to which BAR/BRI stipulated. As to the merits of the issues raised in the petition, PMBR's only response is that:

> The evidence on which Petitioners rely -- that their full service course always has had *some* MBE preparation, the parties' stipulation reflecting that fact, and petitioners' view that they simply increased the MBE content of their full service course -- at most creates a factual dispute which must be resolved by a jury under the *Hyde/Kodak* test.

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[3] While there is a separate market for tires, the fact that no one is interested in buying a car that lacks tires means that autos equipped with tires do not amount to a tie. Improving the car's performance by equipping it with radial tires would not result in a tie, although forcing the purchaser to buy eight extra spares probably would.

(Opp. at 10 (footnote omitted)) This claim is plainly wrong. There is *no* dispute in this record that (a) BAR/BRI's course has always included some level of MBE preparation, (b) it was *stipulated* that full-service courses by definition include MBE preparation and (c) BAR/BRI added more MBE preparation to its full-service course.

PMBR does not dispute that BAR/BRI, time and again, expanded the MBE component of its full-service course. Yet it was only when BAR/BRI added MBE training in 1992 in response to the constant barrage of competitive claims that the MBE portion of its full-service course was inadequate that PMBR pulled the antitrust trigger. PMBR's claims are based on the fact that when it added training in 1992, BAR/BRI re-named the enhanced portion of its course "Gilbert" without imposing a separate charge. The Tenth Circuit's implicit conclusion that BAR/BRI can improve its MBE preparation so long as it does not call it "Gilbert" makes no sense.

The anticompetitive threat inherent in the approach taken by the Tenth Circuit has been recognized by all other circuits that have addressed the issue. For example, PMBR attempts to dismiss *Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698 (7th Cir.), *cert. denied*, 469 U.S. 1018 (1984), on the grounds that the Seventh Circuit "unremarkably" concluded that a product and its associated trademark are not separate products. (Opp. at 12) The Seventh Circuit's reasoning, however, makes it clear that components of a single composite product cannot be tied. *Jack Walters*, 737 F.2d at 703-04.

Similarly, PMBR ignores the fact that, in each of the other composite product cases cited by BAR/BRI, circuit courts other than the Tenth Circuit held there to be no tie-in despite the fact that the alleged tied component product recently had been, could have been or currently was being

sold separately from the alleged tying composite product. *See Montgomery County Ass'n of Realtors, Inc. v. Realty Photo Master Corp.*, 1993-1 Trade Cas. (CCH) ¶ 70,239 (4th Cir.) (photographs of real estate that recently had been sold separately were packaged with real estate listings), *cert. denied*, 114 S. Ct. 440 (1993); *Souza v. Estate of Bishop*, 594 F. Supp. 1480 (D. Haw. 1984) (houses that were or could have been sold separately were packaged with lease of land), *aff'd*, 821 F.2d 1332 (9th Cir. 1987); *Sobrato v. Prudential Ins. Co. of Am.*, 632 F.2d 786 (9th Cir. 1980) (improvements that could be sold separately were packaged with commercial site).

PMBR's treatment of the *Kodak* decision is also flawed. There, as in *Jefferson Parish*, the Court had no occasion to engage in a substantive review of the limits of the separate demand test with regard to an essential component of a composite product. In neither *Kodak* nor *Jefferson Parish* did this Court even suggest that tying occurs in the absence of any evidence that consumers demand the composite product apart from the essential component.

In sum, the Tenth Circuit's ruling means that all dominant sellers of single products with composite elements are engaged in tying arrangements and possibly subject to per se liability. The record below is more than adequate for the Court to address and reject this unsound and anticompetitive ruling.

II. THE TENTH CIRCUIT IMPROPERLY REJECTED THE PRODUCT IMPROVEMENT DEFENSE

PMBR's arguments regarding the business justification defense are fallacious and misleading. First, it is clear from the record that BAR/BRI has always claimed that product

improvement constituted a legitimate business justification.[4] Indeed, this very issue was briefed at length before the Tenth Circuit, where PMBR argued that case law did not support "[BAR/BRI]'s broad claim that 'product improvement' constitutes an *affirmative* defense to a per se tying violation." (Appellants' Reply Br. at 9 (emphasis added); *see also* Appellants' Opening Br. at 25-29 (section entitled "Product Improvement Is Not A Defense To PMBR's Tying Claim"); Appellee's Br. at 14-19)

Second, the issue is ripe for review because the Tenth Circuit rejected BAR/BRI's argument that there is a product improvement business justification defense to the per se rule under Section 1 of the Sherman Act. *See Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publications, Inc.*, 63 F.3d 1540, 1551 n.9 (10th Cir. 1995). Unless addressed and reversed by the Court, BAR/BRI may be prevented from making this argument at trial.

Third, the Tenth Circuit's rejection of the defense creates a conflict among the circuits as to the availability of a business justification defense to a tying claim. PMBR blatantly misreads *Virtual Maintenance, Inc. v. Prime Computer, Inc.*, 11 F.3d 660 (6th Cir. 1993), in which the court reconsidered in light of *Kodak* a prior decision rejecting the existence of aftermarkets. *Id.* at 664-67. In remanding the case to the district court for a trial under the per se rule, the Sixth Circuit reaffirmed all other aspects of its previous decision, including the business justification defense under the per se rule. *Id.* at 667; *Virtual Maintenance, Inc. v. Prime Computer, Inc.*, 957 F.2d 1318, 1323 (6th Cir.), *vacated on other grounds*, 113 S. Ct. 314 (1992).

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[4] BAR/BRI's eleventh affirmative defense in its answer asserts that its "conduct advanced efficiency and consumer welfare and was justified by legitimate business reasons." (Answer ¶ 78)

PMBR also asserts that other circuits have identified only a "good will" defense. *See, e.g., Metrix Warehouse, Inc. v. Daimler-Benz Aktiengesellschaft*, 828 F.2d 1033, 1040-42 & n.17 (4th Cir. 1987); *Mozart Co. v. Mercedes-Benz of N. Am., Inc.*, 833 F.2d 1342, 1348-50 (9th Cir. 1987), *cert. denied*, 488 U.S. 870 (1988). The claim that maintaining good will requires the use of certain spare parts and the claim that changes in a product are needed improvements are simply variations of the business justification defense, which has now been rejected out of hand by the Tenth Circuit. Like the good will defense, product improvement should be treated as a legitimate business justification for an otherwise unlawful tie because it is procompetitive. *See* Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶¶ 738.1, 738.4 (Supp. 1995).

Finally, issues such as the product improvement defense, among others, underscore the need to revisit the per se rule against tying arrangements.

III. THE TENTH CIRCUIT'S PREDATORY PRICING HOLDING IGNORES UNDISPUTED COMMERCIAL REALITIES AND CONTRARY PRECEDENT

PMBR's predatory pricing argument again elevates form over substance. The Tenth Circuit erroneously allocated a price of zero to the Gilbert MBE training portion of BAR/BRI's summer 1992 course. Obviously, no student obtained Gilbert for nothing. To the contrary, the only way to receive the Gilbert MBE training portion was to pay $795 or purchase it separately for $325. Either price admittedly exceeds any relevant measure of cost. PMBR offers no response to these hard facts.

The Tenth Circuit also ignored contrary precedent in other circuits, which have unqualifiedly acknowledged this

reality in analogous circumstances. In *Directory Sales Management Corp. v. Ohio Bell Telephone Co.*, 833 F.2d 606 (6th Cir. 1987), a telephone company gave a first yellow pages listing away for "free" to business customers subscribing to telephone service. The Sixth Circuit found that to demonstrate predatory pricing, the plaintiff would have to show that "overall charges for advertising space in their yellow pages are priced below cost." *Id.* at 614. Similarly, in *Buffalo Courier-Express, Inc. v. Buffalo Evening News, Inc.*, 601 F.2d 48 (2d Cir. 1979), a newspaper began offering "free" Sunday editions to six-day subscribers. The Second Circuit ruled that losses would have to be assessed for the "operations taken as a whole." *Id.* at 55.

This issue, like the "composite product" and "product improvement" issues, is ripe for review because the record now contains all the relevant evidence needed for full consideration by the Court.

IV. THE TENTH CIRCUIT BROADLY EXPANDED A MONOPOLIST'S DUTY TO COOPERATE WITH RIVALS AND IGNORED THE SIGNIFICANCE OF UNDISPUTED FACTS

PMBR's assertion that this case does not implicate *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), ignores the import of the ruling below. Under the Supreme Court's decisions, the *only* circumstance in which a monopolist has a duty to cooperate with a rival is when it controls an "essential facility" or has a long history of

cooperation.[5] The Tenth Circuit's decision would remove these limitations without providing any guidelines or parameters.

PMBR's inflammatory allegations regarding BAR/BRI's intent cannot be the basis for this duty. As the Court recently observed:

> Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws; those laws do not create a federal law of unfair competition or "purport to afford remedies for all torts committed by or against persons engaged in interstate commerce."

Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 113 S. Ct. 2578, 2589 (1993) (citation omitted). *See also Spectrum Sports, Inc. v. McQuillan*, 113 S. Ct. 884, 891-92 (1992). Thus, all of the issues of fact asserted by PMBR as evidencing BAR/BRI's desire to defeat PMBR in the marketplace are without legal significance.

Finally, this broad new duty is premised on conduct for which there is no evidence of competitive harm to PMBR. BAR/BRI and PMBR both offer courses within the city limits of Denver (Davis Aff. ¶¶ 37-8 & Ex. 19; Feinberg Aff. ¶ 47; Pretrial Order ¶¶ IV.F.1., IV.F.2.); PMBR courses end at 4 p.m. and BAR/BRI courses do not start until 6 p.m. (Davis Aff. ¶ 37; Cert. Pet. App. 49a). These facts certainly do not create a sufficient predicate for a duty to cooperate with a competitor.

Thus, the record is well-suited for review because no evidence has been produced that could support a finding of objectively anticompetitive conduct.

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[5] *See, e.g., id.* at 600-01, 603-05; *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *Lorain Journal Co. v. United States*, 342 U.S. 143, 152-53, 155 (1951).

CONCLUSION

For the reasons set forth above and in the petition, a writ of certiorari should issue.

Respectfully submitted,
s/ Stephen M. Axinn

Stephen M. Axinn
Counsel of Record
Skadden, Arps, Slate,
Meagher & Flom
919 Third Avenue
New York, New York 10022
(212) 735-3000

Hardin Holmes
Tucker K. Trautman
Of Counsel
Ireland, Stapleton,
Pryor & Pascoe
1675 Broadway,
Suite 2600
Denver, Colorado 80202
(303) 623-2700

Counsel for Petitioner HBJ Legal

Wiiliam F. Schoeberlein
Edward P. Timmins
Of Counsel
Otten, Johnson,
Robinson, Neff
& Ragonetti
950 17th Street,
Suite 1600
Denver, Colorado 80202
(303) 825-8400

Counsel for Petitioner CBR

APPENDIX

APPENDIX*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

MULTISTATE LEGAL STUDIES, INC., a Delaware corporation,	)	
Plaintiff,	)	
-vs-	)	Civil Action
	)	No. 92-Z-2330
HARCOURT BRACE JOVANOVICH LEGAL AND PROFESSIONAL PUBLICATIONS, INC. and COLORADO PROFESSIONAL EDUCATION, INC. d/b/a COLORADO BAR REFRESHER, INC.,	)	
Defendants.	)	
- -	)	

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* Page 421 of PMBR's appendix on appeal to the Tenth Circuit is an illegible photocopy of a handwritten note by Stephen P. Davis. Because the exact text of this note is recited within the portion of Mr. Davis' deposition cited by PMBR and reproduced herein, *see infra* pp. 3a-4a, the note itself has not been reproduced.

DEPOSITION OF
STEPHEN P. DAVIS
Thursday, April 15, 1993
8:40 a.m.

. . . .

MR. FABRIKANT: Let me have marked as No. 17 --

(Exhibit 17 marked.)

MR. FABRIKANT: -- a document that bears the number CBR 2416.

Q (BY MR. FABRIKANT) Sir, can you identify this document?

A Yeah, this is an internal memorandum or reminder that I wrote for my personal use in remembering a conversation with Russ Granger.

Q Okay. Who -- is this your handwriting?

A Yes, it is.

Q And does this reflect a telephone call with Mr. Granger?

A It reflects -- yeah, a callback or a return of his call.

Q And this was a discussion you had with him on January 16th of 1992?

A Yes.

Q Now, at the time, did you know who Mr. Granger was?

A Yes, I had met Mr. Granger.

Q And who is he?

A He was a person who was staffing a sales table for PMBR at the University of Denver Law School.

Q Okay. Can you read into the record the entirety of your handwritten note?

A At the top of the page is a standard form phone message returned, which recites my initials. It says "From Russell Granger"; the date, 1-16-92; the time 9:48 a.m.; his phone number for me to return the call of 988-5297. And my notation in the message area, called back, to indicate that I did return the call.

The initials are those of my secretary on the memo. My note attached to that phone memo reads: He wanted permission to put brochures inside my class at DU. I said that, at least for this course, 'no'.

I pointed out my long-term concern with their possible expansion of full review into Colorado

and therefore I shouldn't help in any way with their goodwill and name recognition here.

I said that without their full bar as a future threat, there had always been some room for cooperation, i.e., schedule coordination and literature availability.

He was to check with Bob Feinberg for a feel as to imminence of expansion here, and if it looked clear in the foreseeable future, we would discuss further with eye to summer '92 at earliest.

We both acknowledged that there could be no agreement by them as to expansion here due to possible antitrust implications.

Concluded with my initials.

Q Okay. All right. Does this accurately set forth the substance of your telephone discussion with Mr. Granger?

A Certainly not the entirety of it, but the points that I thought I might need a record of.

Q And why might you think you need a record of those points?

A Because some discussion was included in there of cooperating with a competitor, and I would want to be certain that I could document that in those discussions we carefully approached any such effort of cooperation with

PMBR and avoided -- or at least attempted to avoid any antitrust violations in arriving at any cooperative operation.

Q What was the source of your antitrust concerns at that point in time, if any -- strike that.

Did you have an antitrust concern in talking with Mr. Granger?

A I was concerned if any direct cooperative effort between myself and a competitor would be an antitrust problem.

Q What was the source of your understanding in that regard?

A A general understanding that competitors should not coop[illegible]e and make agreements between themselves, and some prior threats from an SMH administrator that antitrust litigation could be filed against us if we entered into cooperative arrangements with PMBR.

Q And when was that statement made to you?

A That statement related back to somewhere in the mid 1980's.

Q And who at SMH made that statement to you?

A A James Branch.

Q And what was the occasion for him making such a statement to you?

A Well, at that point in time, I was only an assistant, so it was not directly to me. I was only third-party to the conversations between him and Mr. Kopel.

Q Uh-huh. And what did -- what was the occasion for that discussion between Mr. Branch and Mr. Kopel?

A I'm not sure exactly what the contemplated cooperation between Kopel and PMBR might have been or what exactly raised Mr. Branch's concerns. Mr. Branch enjoyed threatening litigation, and this was one of several occasions where he did so.

Q Did the Palmer decision from the Supreme Court have anything to do with your noting here antitrust as a potential issue?

A Certainly, by January of '92 I was aware of its existence, and it did nothing to reduce my concerns.

Q Did it enhance your concerns?

A I don't know that it -- it made them more present, but I don't know that it increased or decreased them.

Q All right. Now, you say here that, I pointed out my long-term concern with their possible

expansion of full review into Colorado. What did you mean by that?

A At that point in time, I was aware that PMBR was offering full-service bar review for more than one jurisdiction and expanding into additional jurisdictions; one of those expansion markets being potentially Colorado.

Q Then it says, And therefore, I shouldn't help in any way with their goodwill and name recognition here. Now, were you concerned about the possibility -- in January of '92 -- that PMBR might begin offering a full-service course in Colorado?

A Yes, I was.

Q Why were you concerned about it?

A Because they were expanding into other states, and there was no reason to believe that they would not expand here. And it would be very easy for them to do so. It seemed to be the prudent business position to take.

Q Why would you consider it easy for them to expand into Colorado?

A Once they had developed a course which they considered transportable into other jurisdictions, it's easy to take a full-service course into any state in the United States with very few exceptions.

Q And what would those exceptions be?

A Louisiana.

Q Anything else?

A Washington State.

Q Why Washington State?

A Because Washington State does not utilize the Multistate Bar Examination.

Q Uh-huh.

A Iowa for the same reason. It does not utilize the Multistate Bar Examination.

Q Uh-huh.

A Indiana for the same reason, that it does not utilize the Multistate Bar Examination. West Virginia for the reason that it tests a lot of localized law. Most states, and certainly Colorado, it would be easy to take and modify and transport their course from California into Colorado.

Q Why did you think it would be easy for them to do that?

A Because they would have all the components necessary to do so.

Q Would it have been necessary for them to develop any local -- any lectures or program materials on Colorado specific topics?

A There would be little or no -- almost none. The only Colorado-specific topic that they would absolutely have to deal with would be the performance test.

Q What about -- are there any subjects that are offered in your full-service course which are Colorado specific?

A Only the performance test and SA testing.

Q Are there any -- is it fair to say, then, that all of the other lectures are given by BAR/BRI lecturers except for these Colorado-specific courses you've just identified?

A Well, no. Family law, for instance, is lectured by a Colorado lecturer, but the preparation of the materials is based on a general and not a state specific subject.

Q Are there any state subjects in Colorado other than the ones you've just mentioned?

A There is no areas of law which are tested at the state specific level.

Q Is Colorado different in that regard from other states?

A Colorado is mainstream in that regard.

Q Do you know how California is in that regard?

A No, I don't know specifically about California.

Q What about civil procedure?

A In Colorado, it is tested under the federal rules.

Q And criminal procedure as well?

A Under the U.S. Constitution.

Q Okay. Now, the next sentence says, I said that without their -- what's the next words there? -- I said that without their --

A -- full bar --

Q -- as a future threat, there had always been some room for cooperation, i.e., schedule coordination and literature availability. What did you mean by that?

A I meant that throughout the period of time that I had been involved with the bar review when there was a distinguishable and non-competitive position between PMBR and Colorado Bar Refresher where they were offering purely a supplemental program and I was offering full-service, that there had been and could have been some

productive efforts to cooperate with one another, perhaps to share information in promulgating our schedules and perhaps to cooperate with one another in making brochures and literature available to students.

Q Were you -- and did you say just that to Russell Granger?

A That the potential had always existed --

Q -- but --

A -- for that.

Q But -- and did you say that to Russell Granger in your telephone call?

A Yes, that prior to their having positioned themselves to compete directly for full-service enrollment with me, there -- it had been, in my opinion, an open possibility to arrive at some cooperative arrangements.

Q But were you saying that it was not an open possibility to have cooperative arrangements with PMBR so long as they constituted a future threat with their full bar?

A I'm saying that since they had now positioned themselves as being a direct competitor, in a potential circumstance wherever a student who took their course would not take mine, that it would be much more difficult to cooperate. There would be a much greater risk of it involving a level of antitrust cooperation between com-

petitors, and it could be an act of business stupidity on my part.

Q Were you hoping to persuade PMBR to not institute a future threat to offer a full-service bar in Colorado by offering the fig leaf of schedule coordination and literature availability?

A I had no illusions at all that the golden opportunity to cooperate in scheduling with me would deter them from entering the market if they thought it was profitable for them. I simply would have preferred -- frankly, I would have preferred to cooperate with them on scheduling and would have liked to at least know whether or not they felt that was something we could do.

Q Why would you have preferred to cooperate on scheduling?

A I would prefer to minimize the number of complaints that I get from students about schedule conflicts.

Q Why would you have preferred to do that?

A I don't like it when my students complain.

Q How could you have engaged in schedule coordination with PMBR given the fact that they were a competitor of yourself in the supplemental bar review market?

A Since my primary product has always been a full-service bar review, then I would have no problem with enhancing my full-service product by sharing information with them that would let them eliminate conflicts.

Q Well, would you have felt that way even though that would have made it easier for PMBR to compete with you in the supplemental market?

A In the supplemental market, the competition with PMBR was based on much more significant factors than whether or not I made life easier for my full-service students.

Q And what were these significant factors to which you are referencing?

A The persistent use of disparaging and false advertising by PMBR in mischaracterizing BAR/BRI in general and Gilbert's or HBJ Multistate, which I am certain to those students who read and listened to it had much more bearing in their mind than a possible schedule problem.

Q Now, how long -- I didn't mean to interrupt you.

A That's fine. There's one. There are probably other factors.

Q Now, how long have you had the belief that PMBR has engaged in false and deceptive advertising practices with respect to CBR?

A As long as I have been aware of PMBR advertising which would date back to about 1980.

Q And have you ever expressed a view to others that you believe that PMBR was engaging in false and deceptive advertising?

A I have expressed that view to Richard Conviser; I've expressed it to Gerald Kopel during the time that he was running it; I've expressed it to PMBR on a couple of occasions, but I have not expressed it to consumers or anyone other than that.

Q Now, to whom at PMBR did you express that point of view?

A A gentleman by the name of Jarad Gross.

Q When did you do that?

A About 1986.

Q Have you held the view that PMBR is engaged in false and deceptive advertising -- have you held that view from 1980 to the present?

A Yes, I have.

Q Was there ever a point in time during that time that you felt that PMBR was not engaging in false and deceptive advertising?

A No.

Q Why did you not sue them?

A Because I was certain if I did, one, I could not afford the cost of litigation, and two, I would not be able to afford the cost of defense against an entity which was many times my size financially.

Q Now, is BAR/BRI paying the legal fees in this case to prosecute the false advertising claim that you have filed against PMBR?

A BAR/BRI is paying the claims -- my claims on this case in terms of the defense and the related counterclaims. They are paying those fees only because the case was generated by a complaint against me. We had no agreement with them that would permit me to obligate them on a legal fee by filing an initial case.

Q But, what provision in your licensing agreement requires BAR/BRI to pay legal fees for you to sue PMBR?

A The raising of counterclaims is something which they certainly have the option of determining is or is not within the appropriate scope of defense. I would say that is a tactical and legal judgment between BAR/BRI and their counsel whether they choose to characterize any counterclaims as exceeding the scope of an appropriate defense.

Q Is it your testimony that the reason you brought the claim now, but not before, was because BAR/BRI is willing to pay for it?

A Because -- for two reasons: One, because now I'm in court anyway, so there is no way to avoid it; and two, since BAR/BRI is involved and it is a defense, I do have assistance with the cost of litigation.

Q When you say there is no way to avoid it, what do you mean by that?

A Since I'm already in court, I can't stay out of court. By not filing a case two years ago, I stayed out of court altogether.

Q Okay. Now, it says in the next sentence that he was to -- I'm sorry. What did Mr. Granger *say [sic], if anything, in response to your discussion about schedule coordination and literature availability?

A He agreed, in general, that it would be productive and useful in Colorado where there was no real reason for strong animosity or problems to have some level of cooperation. He thought it would be a desirable thing, and said that he would get back to me if there was anything further that developed on it.

Q Well, it says that he was to check with Bob Feinberg for a feel as to -- what is that next word? -- as to --

A Imminence.

Q -- imminence of expansion here. Is that right? Did Mr. Granger agree to do that?

A He suggested that he was going to. I wouldn't call it an agreement. He made that statement that he was going to check with Feinberg.

Q And had you asked him to do that?

A No, I had not.

Q Did you want him to do that?

A I really -- I thought it was a good idea on his part.

Q Why?

A If, in fact, there was an opportunity and a productive purpose to be served by cooperating, I would rather -- and, in fact, my concerns about PMBR's expansion in Colorado were totally unfounded, then it would seem unreasonable on my part to forgo those benefits of cooperation.

UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

Civil Action No. 92-Z-2330

MULTISTATE LEGAL STUDIES, INC., a Delaware Corporation,

Plaintiff,

v.

HARCOURT BRACE JOVANOVICH LEGAL AND PROFESSIONAL PUBLICATIONS, INC. and COLORADO PROFESSIONAL EDUCATION, INC. d/b/a COLORADO BAR REFRESHER, INC.,

Defendants.

AFFIDAVIT OF ROBERT FEINBERG

. . . .

60. In contrast, out of 24 schedule conflicts in the Winter of 1991 there were 8 major conflicts (or 33.3%); out of 20 schedule conflicts in the Summer of 1991 there were 9 major conflicts (or 45%); out of 32 schedule conflicts in the Winter of 1992 there were 12 major conflicts (or 37.5%); out of 37 schedule conflicts in the Summer of 1992 there were 17 major conflicts (or 45.9%); out of 30

schedule conflicts in the Winter of 1993 there were 13 major conflicts (or 43.3%); and out of 33 schedule conflicts in the Summer of 1993 there were 11 major conflicts (or 33.3%).